

FIRST PRINT

HOMEFUND MORTGAGE RELIEF BILL 1993

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

Under the Contracts Review Act 1980, the Supreme Court may make various orders in relation to a contract it finds to be unjust. (It may, for example, vary the terms of the contract or declare the contract void.)

The object of this Bill is to enable the Commercial Tribunal of New South Wales to exercise the powers of the Supreme Court under the Contracts Review Act 1980 in respect of particular mortgages. The mortgages concerned are mortgages of residential property in which the mortgagee is the Permanent Trustee Company Limited as Trustee for the FANMAC Trusts ("HomeFund" mortgages).

The Bill also empowers a mortgagor under such a mortgage to discharge the mortgage before the end of the term of the mortgage without attracting a penalty.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on assent.

Clause 3 defines terms used in the proposed Act.

Clause 4 allows the Commercial Tribunal of New South Wales to exercise the power of the Supreme Court under the Contracts Review Act 1980 in respect of HomeFund mortgages.

Clause 5 requires the proposed Act to be read and construed as part of the Contracts Review Act 1980.

Clause 6 specifies the period during which an application to the Tribunal may be made.

Clause 7 makes it clear that the Tribunal may find a HomeFund mortgage unjust on (among other grounds) the ground that its interest rate is excessive. It also requires the Tribunal to have regard to representations made to the mortgagors when determining an

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application for relief. Persons whose representations concerning a HomeFund mortgage caused loss or damage to the mortgagor may be joined as parties to the application and the Tribunal may make such orders as it sees fit in relation to those persons.

Clause 8 empowers the Tribunal to re-open a transaction relating to a HomeFund mortgage and to make such orders as it sees fit in relation to the transaction or mortgage.

Clause 9 prevents a person whose application for relief has been determined by the Supreme Court from seeking relief in respect of the same HomeFund mortgage from the Tribunal, and vice versa.

Clause 10 provides for early discharge of HomeFund mortgages.

Clause 11 provides that the proposed Act applies in respect of a HomeFund mortgage whether the mortgage was entered into before or after the commencement of the proposed Act.

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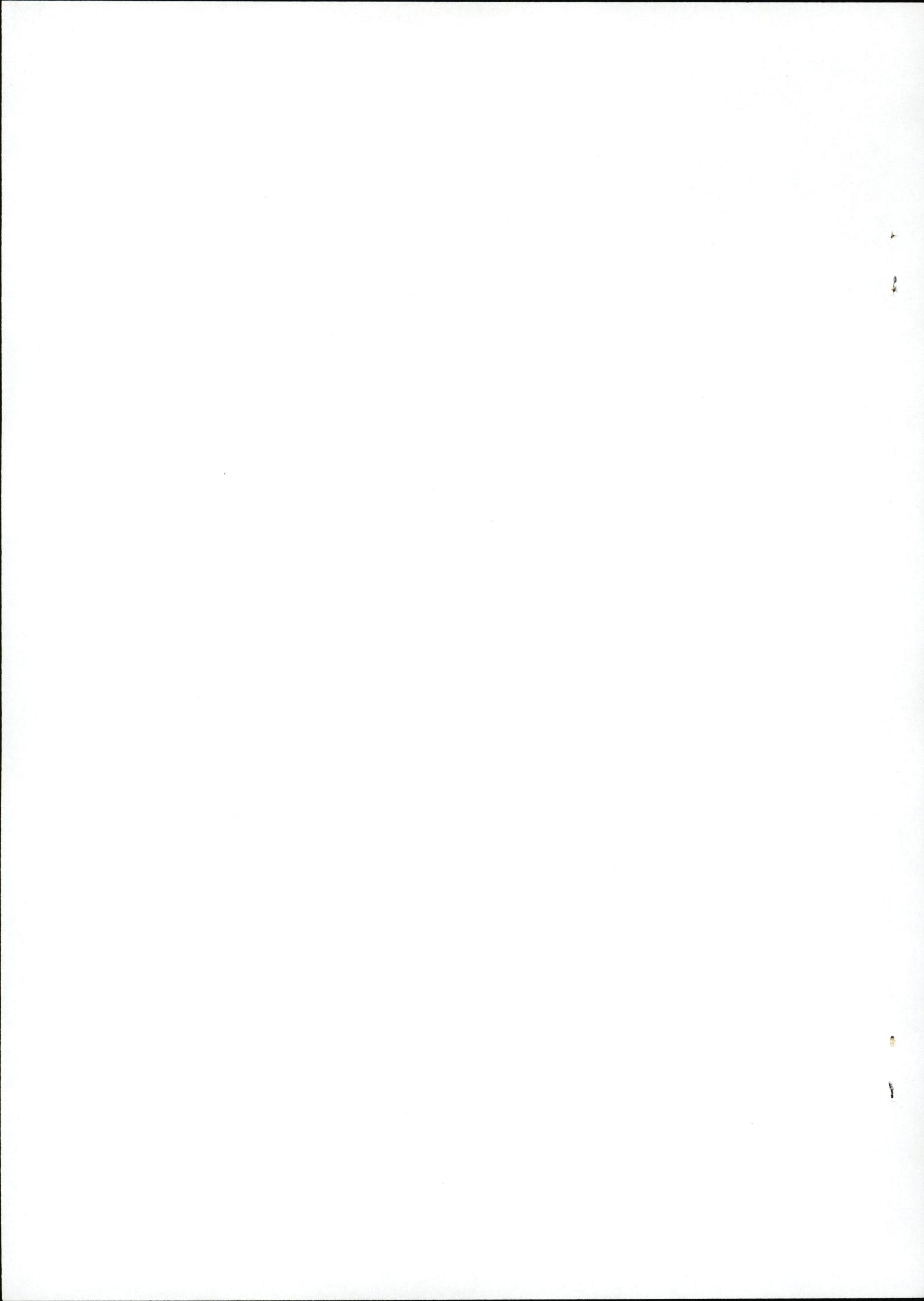
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HOMEFUND MORTGAGE RELIEF BILL 1993

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No. , 1993

A BILL FOR

An Act to provide that the powers of the Supreme Court to grant relief under the Contracts Review Act 1980 may be exercised by the Commercial Tribunal in respect of certain mortgages; and for other purposes.

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The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the HomeFund Mortgage Relief Act 1993.

5 Commencement

2. This Act commences on the date of assent.

Definitions

3. In this Act:

10 **“HomeFund mortgage”** means a mortgage which was executed as mortgagee by the Permanent Trustee Company Limited as Trustee for the FANMAC Trusts, and includes the credit contract secured by such a mortgage and any guarantee or other associated contract;

“Tribunal” means the Commercial Tribunal of New South Wales.

Tribunal may exercise certain powers

15 4. The jurisdiction and powers of the Supreme Court under the Contracts Review Act 1980 may also be exercised, in respect of a HomeFund mortgage, by the Tribunal on application made to it in accordance with rules of the Tribunal. The Tribunal has jurisdiction and powers accordingly.

20 Contracts Review Act 1980

25 5. (1) This Act is to be read with and construed as part of the Contracts Review Act 1980, and provisions of that Act that apply to or in consequence of the making of any order or the exercise of jurisdiction by the Supreme Court under that Act extend to apply in relation to any orders made or jurisdiction exercised under that Act by the Tribunal in accordance with this Act.

 (2) An order made by the Tribunal by virtue of this Act is to be complied with, and may be enforced, as if it were an order made by the Supreme Court.

30 (3) For the purpose of the exercise by the Tribunal of power under the Contracts Review Act 1980, references in that Act to rules of court are to be construed as references to rules of the Tribunal.

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When application may be made to Tribunal

6. (1) Section 16 of the Contracts Review Act 1980 does not apply in respect of an application for relief made to the Tribunal, but an application to the Tribunal may be made only within 3 years after:

- (a) the date on which this Act commences; or 5
- (b) the date of the HomeFund mortgage to which the application relates,

whichever is the later date.

(2) An application may be made even though the mortgage to which the application relates has been discharged. 10

Additional matters to be considered

7. (1) For the purpose of determining an application made to it, the grounds on which the Tribunal may find a HomeFund mortgage or a provision of a HomeFund mortgage unjust include the ground that the interest rate is excessive having regard to the risk, the value of any security, the amount of the consideration, the time for repayment, the amount financed, the purposes of the scheme under which the mortgage was granted and any other relevant circumstances. 15

(2) In determining an application, the Tribunal is to have regard to (in addition to the matters referred to in section 9 of the Contracts Review Act 1980) any statement or representation made to the mortgagor, a person acting on behalf of the mortgagor or a person having an interest in the land the subject of the mortgage by an agent or employee of: 20

- (a) the Permanent Trustee Company Limited; or
- (b) FANMAC Limited; or 25
- (c) the Trustee of the FANMAC Trusts; or
- (d) the Department of Housing; or
- (e) a co-operative housing society through which an arrangement relating to the HomeFund mortgage was made,

whether or not the person who made the statement or representation was an agent of the mortgagee at the time the statement or representation was made. 30

(3) If the Tribunal finds that a person referred to in subsection (2) has caused the mortgagor any loss or damage because of the person's statement or representation, the person may be joined as a party to the application and (without limiting the powers of the Tribunal under the Contracts Review Act 1980) the Tribunal may make any order it sees fit 35

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in relation to the person (including an order that the person pay an amount to the applicant by way of compensation in respect of the loss or damage).

Re-opening certain transactions

- 5 **8.** Without limiting the powers of the Tribunal under section 14 of the Contracts Review Act 1980, the Tribunal may, for the purpose of exercising its powers under that Act, re-open a transaction to which a HomeFund mortgage relates and may make such orders in relation to the mortgage or transaction as it sees fit.

10 **Multiple proceedings**

- 9.** (1) A person whose application for relief in respect of a HomeFund mortgage has been determined by a court under the Contracts Review Act 1980 may not make an application to the Tribunal for relief in respect of the same mortgage.
- 15 **(2)** A person whose application for relief in respect of a HomeFund mortgage has been determined by the Tribunal may not make an application to a court under the Contracts Review Act 1980 for relief in respect of the same mortgage.
- (3)** If a person makes application both to a court under the Contracts Review Act 1980 and to the Tribunal for relief in respect of the same HomeFund mortgage, the respondent to either application may, by written notice, require the applicant to nominate the application with which he or she intends to proceed. Both proceedings lapse unless the applicant makes that nomination and withdraws one application within 28 days after receiving the notice.
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Early redemption

- 10.** (1) A mortgagor under a HomeFund mortgage may discharge the mortgage at any time after giving the mortgagee 1 month's written notice by paying to the mortgagee, on or before the end of the period of notice, all money owing under the mortgage at the end of that period, other than:
- 30
- (a) a financial penalty for early discharge; or
 - (b) interest on the principal sum for the unexpired portion of the term of the mortgage.
- (2)** This section applies in addition to any relief that may be granted pursuant to the Contracts Review Act 1980 and despite section 93 of the Conveyancing Act 1919.
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Mortgages to which this Act applies

11. This Act applies to a HomeFund mortgage entered into before the commencement of this Act as well as to a HomeFund mortgage entered into after that commencement.
